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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

THE STATE HIGHWAY COMMISSION OF KANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (paragraph 1) of the Supreme Court of the United States, appellant (defendant below) presents this separate statement particularly disclosing the basis upon which it contends the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Kansas entered herein.

Statutory Provision Sustaining Jurisdiction.

The Supreme Court's jurisdiction in this case is invoked under Sec. 237 (a) of the Judicial Code of the United States, 43 Stat. 937 (28 U. S. C. Sec. 344), which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Statute of the State of Kansas, the Validity of Which is Involved.

The Statute of Kansas, the validity of which, under the Constitution of the United States, is challenged is Sec. 16, Chapter 225, Laws of 1929 (Sec. 68-415 R. S. Kansas, 1931 Supp.), which reads as follows:

"Removal of poles, piers, abutments, pipe lines or other fixtures along highway; procedure.

"Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highway, such poles, wires, piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway commission and the state highway commission is authorized and empowered to require the removal of

such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highways as the state highway commission shall designate, and if said person, firm or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abutments, wires, pipe lines and other fixtures to such place on the right of way of said state highways as may be designated by said state highway commission and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of cost being furnished to said person, firm or corporation. If said person, firm or corporation refuses to pay said charges, the state highway commission shall notify the attorney-general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount; such amounts received from such persons, firms or corporations shall be placed in the fund from which the cost of such removal was paid."

Date of the Judgment Sought to Be Reviewed and of the Application for Appeal.

The judgment appealed from was entered on the 9th day of June, 1934, on which date the Supreme Court of Kansas overruled motion for rehearing and thereafter duly issued a peremptory writ of mandamus against the appellant. The application for an appeal was presented on the 27th day of August, 1934.

Nature of the Case and Rulings of the Court Below Which Bring it Within the Jurisdictional Provision Relied Upon.

The appellant (defendant below) is a Delaware corporation, duly licensed as a foreign corporation to carry on its business in the State of Kansas. It owns and operates a high pressure pipe line system and a telephone line in and through the State of Kansas which is used in transporting natural gas produced in Texas and other States into and through Kansas and other States in interstate commerce.

The appellee (plaintiff below) is an administrative agency created as a body corporate by legislative act and is by statute vested with the authority and charged with the duty to lay out, open, relocate, alter, vacate, redesignate and reestablish highways in the State of Kansas. It has authority to acquire title by purchase, donation or dedication or by the exercise of the right of eminent domain to any lands or interests or rights therein for the purpose of carrying out its functions, duties and obligations.

In furtherance of its powers and duties with respect to locating and constructing new highways, appellee has laid out routes for certain new highways across privately owned lands in the State of Kansas. At six different points the proposed routes of such new highways intersect and cross the privately owned pipe line and/or telephone line and rights of way of the appellant. The pipe line and telephone line of the appellant are located upon private lands, and are not located upon, along or across any existing highway. The appellant acquired its rights of way at said points from the owners of the land during the year 1930. The right of way grants from landowners gave appellant a perpetual right to lay, maintain, alter, repair, operate and remove pipe lines, drips, gates, telephone and telegraph

lines and all appurtenances convenient for the transportation of oil, gas or other substances. Appellant constructed its said pipe line and telephone line during the years 1930 and 1931 and said lines have at all times since been maintained and operated across said land.

During the year 1933, the appellee acquired from the owners of the fee title, rights of way for the construction, operation and maintenance of public highways over these same lands. Appellee has not procured the consent or permission of the appellant to occupy its said right of way or to construct said highway across its said right of way; nor to make changes or alterations in appellant's said lines, nor to remove the same to another location; nor has it procured such right by condemnation. According to its plans and specifications appellee has found it necessary that changes and alterations be made in the design and location of appellant's pipe line and telephone line, requiring in certain instances the removal of said lines to a different location, in other instances the lowering of the lines below drainage ditch level and in others requiring the encasing thereof at points where the proposed highway will cross the same. Appellee ordered appellant to make such changes and alterations forthwith at appellant's own cost and expense and notified appellant that it would not bear such cost or any part thereof. The fair and reasonable cost of making such changes and alterations to conform with the appellee's plans and specifications amounts to the sum of $5460.00.

Upon refusal of appellant to comply with appellee's orders to make such changes and alterations in its said lines to conform to the construction, plans and specifications of appellee, the said appellee on January 15, 1934, filed a verified motion in the Supreme Court of Kansas for an alternative writ of mandamus requiring appellant to forthwith proceed to make and complete in an efficient and workmanlike manner the said changes in its lines in accordance with

the orders, plans and specifications adopted by the appellee for the improvement of the highways in question.

On said 15th day of January, 1934, an alternative writ of mandamus was issued by the Supreme Court of Kansas ordering and directing the appellant to forthwith proceed to make and complete in an efficient and workmanlike manner the said changes in its lines in accordance with the orders, plans and specifications adopted and approved by appellee or to show cause on or before January 25, 1934, why the same should not be done. Thereafter, and on or before said 25th day of January, 1934, appellant duly filed its answer in said cause.

Thereafter, and on or about the said 25th day of January, 1934, appellee filed its motion for judgment on the pleadings in said cause.

On March 10, 1934, a decision was rendered in said case in favor of the appellee making the alternative writ of mandamus theretofore issued peremptory. Thereafter, and within the time provided by the statutes of the State of Kansas and in accordance with the rules and practice of the Supreme Court of said State, appellant duly applied for a rehearing of said cause, which application the Supreme Court of Kansas denied on the 9th day of June, 1934, and thereafter entered its final judgment making the alternative writ of mandamus issued by said court peremptory.

The judgment of the Supreme Court of Kansas in upholding and sustaining the order of the State Highway Commission of Kansas ordering appellant to make changes and alterations in the construction and design of its pipe line and telephone line located upon private property, and not located upon, along or across an existing highway, is based upon the provisions of Sec. 16, Ch. 225, Laws of Kansas, 1929 (Sec. 68-415 R. S. Kansas, 1931 Supp.), which is a statute of the State of Kansas within the meaning of Sec. 237 (a) the Judicial Code.

In its answer filed in the Supreme Court of Kansas appellant set forth, alleged and contended that said statute applies only to changes and alterations in the design and construction of pipe lines and telephone lines constructed and installed along, upon or across existing highways, and not to such lines as are located upon private property or private rights of way and not located upon, along or across existing highways; that if construed and interpreted to mean that the State Highway Commission may require appellant at its own cost and expense to remove, relocate, change and alter the design of its pipe line and telephone line located upon privately owned property, and not located upon, along or across any existing State highway, said statute is unconstitutional and void as repugnant to the Constitution of the United States, in violation of the Fourteenth Amendment to the Federal Constitution and particularly of section one thereof, and that such construction and interpretation will operate to take appellant's private property without due process of law and will deny to said appellant the equal protection of the laws. In its said answer the said appellant set forth the facts on which it challenged the validity of said statute, if so construed and interpreted, as repugnant to the Constitution of the United States and particularly the Fifth Amendment, section one of the Fourteenth Amendment, and section eight of Article one of said Constitution.

Application or petition for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Kansas on the 27th day of August, 1934, and allowed by him on that day. The following cases and decisions of the Supreme Court of the United States are believed to sustain its jurisdiction of appeal:

Cumberland Coal Co. v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U. S. 23, 76 L. Ed. 146;

Detroit & Mackinac Ry. Co. v. *Michigan Railroad Com.*, 240 U. S. 564, 60 L. Ed. 802;

People of the State of New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 73 L. Ed. 184;

Brinkerhoff-Faris Trust & Savings Bank v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107;

Southern Railway Co. v. *Virginia ex rel. Shirley*, 290 U. S. 190, 78 L. Ed. 186;

Harold B. Fiske v. *State of Kansas*, 274 U. S. 380, 71 L. Ed. 1108;

Julia V. Miller et al. v. *W. J. Shoene*, 276 U. S. 272, 72 L. Ed. 568.

Appellant claims that the judgment of the Supreme Court of Kansas, in case No. 31804 on its docket, sustaining and in effect affirming the order of the State Highway Commission of Kansas, is confiscatory and deprives it of its property without due process of law and denies it the equal protection of the laws contrary to the provisions of the Constitution of the United States, and particularly violates section one of the Fourteenth Amendment, and also the Fifth Amendment to the Constitution of the United States, and section eight, Article One of the Constitution of the United States.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the Acts of Congress above cited.

Respectfully submitted,

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Chester J. Gerkin,
Attorneys for Panhandle Eastern Pipe Line Company.